

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-5212, 5213

MICROSOFT CORPORATION,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al.*,

Plaintiffs-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**RESPONSE OF MICROSOFT CORPORATION
TO THE COURT’S OCTOBER 18, 2000 NOTICE**

Pursuant to the Court’s October 18, 2000 Notice, appellant Microsoft Corporation (“Microsoft”) hereby responds to the Court’s proposal that Michael H. Hites, Ph.D., Chief Technology Officer of the Illinois Institute of Technology, conduct a review session on November 14, 2000 concerning the “fundamentals of automation.”

Microsoft welcomes the Court’s interest in the technical subjects underlying this appeal and believes that the background provided by the review session will assist the Court in resolving the case. Notwithstanding the evident value of such a review session, Microsoft wishes to express certain concerns about the conduct of the session.

1. Despite the expedited nature of proceedings below, the range of technical subjects encompassed by this appeal is very broad, including numerous matters

injected into the case for the first time during the district court's abbreviated consideration of remedies. It will therefore be difficult for Dr. Hites—who presumably is not familiar with the extensive record in the case—to know whether an issue he is addressing in the review session is related to Microsoft's appeal. This problem is exacerbated by the parties' fundamental disagreements over issues that might appear to an uninitiated observer to be uncontroversial, such as the proper definition of a personal computer operating system, creating a risk that the review session will inadvertently stray into disputed topics that bear on liability or relief. Microsoft therefore requests that, at the meeting with Dr. Hites in advance of the review session, the parties be provided with the complete substantive content of his presentation, as opposed to a general outline of topics to be covered, and that they be shown all of the supplemental materials Dr. Hites intends to provide the Court.

2. It is not apparent from Dr. Hites' resume what knowledge or experience he has with personal computer operating systems, as opposed to (i) mainframe operating systems like IBM's MVS or (ii) server operating systems like IBM's AIX variant of UNIX. Dr. Hites' responsibilities at the Illinois Institute of Technology include "Unix administration," so he presumably is familiar with one or more UNIX variants. It also appears from his resume that Dr. Hites has some familiarity with Microsoft's Windows NT and Windows 2000 operating systems. Unfortunately, the design and internal operations of the two Microsoft operating systems addressed at trial, *viz.*, Windows 95 and Windows 98, are quite different from both those of UNIX variants and those of Windows NT and Windows 2000. Consequently, broad generalizations based on experience with those other operating systems could lead to erroneous conclu-

sions. This is a further reason why Microsoft requests that the parties be given detailed notice of what Dr. Hites intends to tell the Court during the review session before it occurs.

3. Among the sponsored research listed on Dr. Hites' resume is a June 2000 project for Sun Microsystems entitled "Unix Training in Community Development." The nature and extent of financial support provided by Sun Microsystems for this project are not disclosed. Sun Microsystems is one of Microsoft's fiercest competitors. James Gosling, a vice president of Sun Microsystems, testified against Microsoft at trial. In addition, Sun Microsystems is suing Microsoft in the United States District Court for the Northern District of California over Microsoft's implementation of Java technologies on Windows—which the district court viewed as an important issue in this case as well. Sun Microsystems has also filed a complaint against Microsoft with the Competition Directorate-General of the European Commission. The gravamen of that complaint is that the client version of Windows 2000 is not interoperable with the server version of Sun Microsystems' Solaris variant of UNIX. That same baseless allegation, although never addressed at trial, appears to underlie some of the most extreme relief awarded by the district court. Accordingly, Microsoft requests further information about Dr. Hites' association with Sun Microsystems.

4. Microsoft appreciates the Court's willingness to allow technical representatives of the parties to attend both the meeting with Dr. Hites in advance of the review session and the review session itself. To avoid entangling the review session with issues in the case, however, Microsoft requests that no person who testified on behalf of

either party at trial either in the courtroom or by deposition be allowed to serve as such a technical representative.

5. Although Microsoft understands the need to keep the size of the review session manageable, it requests that two lawyers for each side, rather than one, be allowed to attend the review session. That will permit the parties to participate more effectively and will not unduly increase the size of the review session.

Respectfully submitted,

William H. Neukom
Thomas W. Burt
David A. Heiner, Jr.
MICROSOFT CORPORATION
One Microsoft Way
Redmond, Washington 98052
(425) 936-8080

October 25, 2000

John L. Warden
Richard J. Urowsky
Steven L. Holley
Richard C. Pepperman, II
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

*Counsel for Defendant-Appellant
Microsoft Corporation*

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2000, I caused a true and correct copy of the foregoing Response of Microsoft Corporation to the Court's October 18, 2000 Notice to be served by facsimile and by hand upon:

Phillip R. Malone, Esq.
Antitrust Division
U.S. Department of Justice
325 Seventh Street, N.W., Suite 615
Washington, D.C. 20530
Fax: (415) 436-6687

Catherine G. O'Sullivan, Esq.
Chief, Appellate Section
U.S. Department of Justice
Antitrust Division
601 D Street, N.W., Room 10536
Washington, D.C. 20530
Fax: (202) 514-0536

And by facsimile and by overnight courier upon:

Richard L. Schwartz, Esq.
Deputy Chief, Antitrust Bureau
New York State Attorney General's Office
120 Broadway, Suite 2601
New York, New York 10271
Fax: (212) 416-6015

Kevin J. O'Connor, Esq.
Office of the Attorney General of Wisconsin
P.O. Box 7857
123 West Washington Avenue
Madison, Wisconsin 53703-7957
Fax: (608) 267-2223

Christine Rosso, Esq.
Chief, Antitrust Bureau
Illinois Attorney General's Office
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601
Fax: (312) 814-2549

Bradley P. Smith